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Unofficial Undergraduate Transcript – UNC Chapel Hill

Student Name: Daniel Stainkamp

Cumulative GPA: 3.626

A Brief Note About My Undergraduate GPA

I performed poorly during my first year of school as an undergraduate at UNC Chapel Hill. Despite graduating salutatorian of my high school with a weighted GPA of 5.6, I earned a GPA of 2.41 during my freshman year. I made significant adjustments to my lifestyle and improved drastically. My GPA the next semester was a 4.0; my cumulative GPA for sophomore, junior, and senior years at UNC was a 3.55.

I completed the Graduate Record Examinations (GRE) much more recently (2016) than I finished undergraduate coursework (2009); I believe those scores offer a more timely and accurate portrayal of my academic aptitude—I scored a 167 on the Verbal Reasoning Section (98th percentile) and a 6 on the Analytical Writing Section (99th percentile).

Of course, my work in law school will be the most recent and the most germane to your considerations for judicial clerk applicants. As you'll see in my law school transcript, my academic performance has improved significantly since my undergraduate coursework.

A complete list of all grades I earned during my undergraduate career follows.

<u>Course</u>	<u>Description</u>	<u>Term</u>	<u>Grade</u>	<u>Units</u>
STAT .011	<u>BASIC STATISTICS</u>	2005 Fall	BE	3.00
GEOG .020	<u>WORLD REGIONAL GEOG</u>	2005 Fall	BE	3.00
ANTH .045	<u>WORLD PREHISTORY</u>	2005 Fall		0.00
ANTH .045	<u>WORLD PREHISTORY</u>	2005 Fall	C+	3.00
PSYC .010	<u>GENERAL PSYCHOLOGY</u>	2005 Fall	BE	3.00
SPAN .004	<u>INTERMEDIATE SPAN</u>	2005 Fall	B-	3.00
CHEM .011	<u>GEN DESCRIPT CHEM I</u>	2005 Fall	BE	3.00
CHEM .011L	<u>QUANT CHEM LAB I</u>	2005 Fall	BE	1.00

CLAR .020	ANCIENT CITIES	2005 Fall	C-	3.00
MATH .010P	ALGEBRA	2005 Fall	PL	0.00
ENGL .006M	1ST YEAR SEM AESTH LIT	2005 Fall	B	3.00
ENGL .011	ENG COMP & RHETORIC	2005 Fall	BE	3.00
ENGL .012	ENG COMP & RHETORIC	2005 Fall	BE	3.00
OR .022	DEC MODELS FOR BUSINESS	2005 Fall	C+	3.00
SPAN .003	INTERMEDIATE SPAN	2005 Fall	BE	3.00
MATH .031	CALC FUNC ONE VAR I	2006 Spring	B-	3.00
ANTH .042	LOC CULTURES GLOB FORCES	2006 Spring	B-	3.00
BUSI .071	FINANCIAL ACCOUNTING	2006 Spring		0.00
ANTH .042	LOC CULTURES GLOB FORCES	2006 Spring		0.00
ECON .010	ECON: INTRO	2006 Spring	C	3.00
BUSI .071	FINANCIAL ACCOUNTING	2006 Spring	C+	4.00
ENGL 131	INTRO/POETRY WRIT	2006 Fall	A	3.00
PSYC 245	ABNORMAL PSYCHOLOGY	2006 Fall	A	3.00
SOCI 250	SOCIOL THEORY	2006 Fall	A	3.00
RELI 323	CULTURAL DIVERSITY	2006 Fall	A	3.00

ENGL 207	INTERMED POET WRIT	2007 Spring	A	3.00
POLI 101	STATE GOVT IN US	2007 Spring		0.00
JOMC 141	PROF PROBS, ETHICS	2007 Spring	B+	3.00
HIST 128	AM HIST SINCE 1865	2007 Spring		0.00
POLI 101	STATE GOVT IN US	2007 Spring	B	3.00
HIST 128	AM HIST SINCE 1865	2007 Spring	A	3.00
JOMC 153	NEWS WRITING	2007 Spring	B	4.00
JOMC 157	NEWS EDITING	2007 Fall	B-	3.00
POLI 100	INTRO TO GOVT IN US	2007 Fall		0.00
POLI 100	INTRO TO GOVT IN US	2007 Fall	A	3.00
JOMC 340	INTRO MASS COMM LAW	2007 Fall	B+	3.00
JOMC 253	REPORTING	2007 Fall	B	3.00
PHIL 330	METAPHYSICS	2008 Spring	A	3.00
JOMC 240	CURR ISS MASS COMM	2008 Spring	B+	3.00
JOMC 458	SO POL THINK & WRIT	2008 Spring	B-	3.00
ENGL 130	INTRO/FICTION WRIT	2008 Spring	A-	3.00
MUSC 145	INTRO TO JAZZ	2008 Spring	A-	3.00

JOMC 394	MASS COMM PRACTICUM	2008 Summer II	PS	1.00
PHIL 170	SOC ETHICS POL THOT	2008 Fall	B+	3.00
PHYA 225	BEGINNING RACQUETBALL	2008 Fall	A	1.00
JOMC 256	FEATURE WRITING	2008 Fall	B+	3.00
PHIL 110	INTRO: GREAT WORKS	2008 Fall	A	3.00
ENGL 307	STYLISTICS	2008 Fall	B+	3.00
JOMC 456	MAGAZINE WRITING	2008 Fall	B+	3.00
ENGL 225	SHAKESPEARE	2009 Spring	A	3.00
ENGL 307	STYLISTICS	2009 Spring	B+	3.00
PHIL 335	THEORY OF KNOWLEDGE	2009 Spring	A	3.00
PHIL 275	PHIL ISSU/GENDER	2009 Spring	A	3.00
LING 545	LANGUAGE AND MIND	2009 Spring	B+	3.00
ENGL 225	SHAKESPEARE	2009 Spring		0.00

May 17, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to give my highest possible recommendation to Daniel Stainkamp for a 2024-2025 clerkship position in your chambers. I have been writing clerkship letters of recommendation for exceptionally bright law students for twenty years at Berkeley Law and UC Davis Law School and Daniel certainly ranks at the top of that list. As a federal court practitioner for thirty years before entering the academy I think I also have considerable pragmatic insight as to the qualities that a successful clerk needs to possess in addition to intellectual brilliance. I can attest to the fact that Daniel has those skills in abundance as well.

For the past few years, I have been a Visiting Scholar at UNC Chapel Hill researching a book on the criminal and civil rights trials arising out of the 1979 Greensboro Massacre. My introduction to Greensboro was as a restorative justice scholar researching the Greensboro Truth and Reconciliation Commission. Over a year ago Daniel was recommended to me as a superlative researcher and editor, and he has exceeded my expectations. Ordinarily I would not have considered a first-year law student for a demanding legal and historical research project, but Daniel was the rare exception. During the course of our collaboration, he has become indispensable to the project. Engaging with Daniel is more akin to working with a colleague than teaching a student.

The research project has required Daniel to organize and make sense of massive amounts of information, execute detailed instructions, exercise considerable initiative, and think creatively. He is an independent thinker but readily takes instruction. His analysis of legal rules and concepts is rigorous, and his writing is glorious yet clear and concise. He is capable of mastering the most theoretical and obscure material and then translating it into accessible language. Daniel's intellectual rigor is matched only by his prodigious work ethic, his leadership abilities, and his sense of ethics. He easily accomplishes the work of three people while at the same time keeping his focus on the task at hand. A mature, nuanced, and sophisticated thinker, Daniel's analysis of both legal and societal issues is always astute.

In my years in practice, I worked extensively with judges as the Ninth Circuit Attorney Representative and on various committees as well as Inns of Court and their consistent complaint about newly minted lawyers was that they had not been trained for practice. As judges they would employ exceedingly bright young attorneys who were of limited use to them because they were incapable of focusing on the practical issue at hand. In contrast, Daniel's extensive experience as a journalist and his focus on solutions mean that he will be able to hit the clerkship ground running.

Finally, Daniel is an absolute joy to work with. Intellectually curious, imaginative, conscientious, and empathetic, his insights always add a new dimension to any conversation. He always takes the work seriously without taking himself too seriously. He is also a person whose judgment I have grown to implicitly trust. He would be such a valuable asset to any judicial chambers.

I hope you will give Daniel's application the most serious consideration. Please do not hesitate to contact me if you require further information.

Sincerely,

Mary Louise Frampton
Professor of Law Emerita
UC Davis School of Law

Mary Louise Frampton - mframpton@ucdavis.edu - 530 - 752 - 3273

May 17, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to recommend Daniel Stainkamp for a clerkship in your chambers. From the very first month I knew Daniel, I could imagine him as a law clerk: both his talent and temperament make him perfectly suited for the role. Daniel is a deep thinker, a beautiful writer, and an extremely mature professional. His work ethic is exemplary, and his earnestness, good humor, and thirst for constructive feedback make him a delight to work with.

I have known Daniel since his first semester of law school, when he became a student in one of my Research, Reasoning, Writing, and Advocacy (RRWA) I classes at UNC Law. (In fact, I remember meeting Daniel during orientation, where I was impressed by his maturity, drive to succeed, and the thoughtfulness of the questions he asked even before starting his legal education.) As a 2L, Daniel chose to enroll in my upper-level Writing for Practice class.

Both RRWA and Writing for Practice are simulation courses taught in small sections. They provide foundational, practice-oriented instruction to help students develop the skills necessary to communicate professionally as attorneys. Because of the size and intensity of these classes, I have gotten to know Daniel very well over the last two years. I've read multiple drafts of his writing across a variety of genres and met with him for about ten required individual conferences. But Daniel didn't stop there: in both classes he took with me, Daniel submitted extra drafts for my review and comment and requested additional meetings to work on specific research and writing skills. We've also met to discuss course selection, topics for his law review comment, possible career paths in the law, and clerkships. As a result, I have first-hand knowledge of Daniel's intelligence and talent, as well as what it's like to work closely and collaboratively with him.

One of the qualities that distinguishes Daniel from his peers is the sophistication of his thought process. Daniel is a rigorous thinker who approaches difficult issues with care and nuance. As we worked through various assignments in class, I could see Daniel's thinking on the relevant legal issues evolve and sharpen, not only after conversations with me—which isn't unusual—but more impressively, after careful and focused independent thought. Perhaps it is his training in philosophy, or the fact that he is older and more mature than many junior attorneys, but Daniel's habits of mind and capacity for deep thinking allow him to reach an incredibly rich and textured understanding of a variety of legal issues.

I would confidently entrust Daniel with the thorniest legal research problems. He was already a strong legal researcher during his 1L year, when he performed well on RRWA's research assessments and demonstrated a firm grasp on research strategy and techniques. Since then, Daniel has only sharpened his research skills through his upper-level courses, employment, including as a research assistant for several professors, and his position on Law Review. I know his work at WilmerHale this summer will give him plenty of hands-on, real-world research training.

Daniel's legal writing is top-notch. His careful, analytical thinking translates to well-organized and impeccably supported written work product. He is especially good at synthesizing a large volume of authorities into cogent rules, selecting key cases to discuss in detail, and thoroughly applying the resulting legal framework to particular facts.

But more than just being a high-caliber legal writer, Daniel has a gift with words. As a first assignment in my upper-level class, I asked students to submit a brief autobiography of themselves as a legal writer. Daniel's began, charmingly, with an explanation of his relationship to the written word more broadly, first as an enthralled listener to his mother's bedtime stories, and then as a writer across a variety of genres: poems, 'zines, short stories, journalistic articles, and even letters to loved ones. The whole thing was, quite frankly, a delight, and his reflections about the relationship between creative and legal writing were insightful. Daniel has written memos that impressed me, briefs that persuaded me, and blog posts that made me laugh out loud. In his final feedback, I wrote that his prose was "a joy to read."

Daniel's oral communication skills match his writing. He thinks on his feet and can articulate complex ideas clearly and persuasively. Daniel's class contributions consistently reflected thoughtful preparation and always elevated the discussion; in fact, his perceptive questions often helped me explain things more clearly, and occasionally even prompted me to reexamine legal writing conventions. Daniel comes to individual meetings with a clear agenda, and when he works in small groups, he consistently keeps his group on task and engaged.

Interpersonally, Daniel is thoughtful, earnest, and caring. He is a true friend to his fellow students. And once Daniel is comfortable in a work environment, his sense of humor shines through (always, I should note, in appropriate ways). He is hard-working and committed, consistently completing tasks for class both thoroughly and well ahead of schedule. Finally, he is steadfastly devoted to public service and specifically to improving the lives of vulnerable communities. I have no doubt that he

Rachel Gurvich - gurvich@email.unc.edu

will use his legal education to effect positive change in the world.

In short, I believe Daniel would be an invaluable addition to your chambers. I would be happy to answer any questions you may have about Daniel. Please feel free to contact me directly at (617) 640-9764 or gurvich@email.unc.edu.

Best regards,

Rachel Gurvich

Rachel Gurvich - gurvich@email.unc.edu

May 17, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write in support of Daniel Stainkamp's application to serve as a clerk in your chambers. Dan has been twice my student, served as a research assistant for me this past summer, and I advised him on his current law review comment. Everything I know about Dan tells me that he would make an excellent addition to any judicial chamber.

I first came to know Dan as a student in my first-year criminal law course in the spring of last year. He immediately distinguished himself as one of the most thoughtful contributors to our classroom discussions. What struck me was the range of his mind. Some students do well during policy discussions; other are strong on the intricacies of fine doctrinal points; still others are particularly good at seeing the connection between the law and the realities of how the criminal justice system operates in practice. Dan excelled at all three. This reflected itself on the final exam, where Dan earned one of the very few straight A's awarded that semester. I ask three very different types of question on these exams: an issue spotting question that turns on fine doctrinal points, a closing argument question where students must argue both sides of an ambiguous set of facts, and a policy question that requires students to analyze and redraft a proposed statute. Dan unsurprisingly did a great job on all three.

I was so impressed with Dan that I offered him a job working as a Research Assistant for me during the summer. He had already been offered some great summer opportunities, but he said that he would make time for a part time position with me. I drew on Dan's editorial skills for work on two very long manuscripts. He proved himself to be one of the most productive RA's I have ever employed, finishing both manuscripts in record time. His work was also meticulous: he worked fast yet carefully.

Dan sought me out in the fall at the early stages of his work on his law review comment on driver license restoration. I offered some preliminary thoughts and have now reviewed the draft he has of the comment. Even though unfinished I recommend it very highly to you. The draft reveals a graceful writing style, comprehensive research and careful analysis. Dan's work is far, far ahead of what most second year law students can produce in the way of legal scholarship.

Finally, Dan was once again my student in the criminal procedure investigation class that I taught this past semester. I could always count on him to raise his hand when the rest of the class was stumped by a particularly difficult question, and he always came up with the right answer to the questions that had clear answers and a useful contribution on the questions that did not.

I give Daniel Stainkamp my highest recommendation for a position as a judicial clerk in your chamber. Please do not hesitate to contact me if I can provide any further information in support of his application.

Sincerely,

Joseph E. Kennedy
Martha Brandis Professor of Law

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WRITING SAMPLE A

I wrote the following motion memorandum in Spring 2022 as the final assignment for Research, Reasoning, Writing, and Advocacy II, UNC Law's first-year legal writing seminar. I was awarded a Certificate of Merit for earning the highest grade in this course. This is my own independent writing, unedited by others.

The assignment was to draft a memorandum in support of a Rule 56(a) motion to for summary judgment. The client for the exercise was the defendant in a suit filed under the Lanham Act, 15 U.S.C. §§ 1125 *et seq.*

The parties and facts are all hypothetical, and the legal analysis was based on a closed universe of cases as chosen by the legal writing faculty. Several of those cases were edited for the assignment.

Case No. C21-1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION

TRILÁTERO TEX-MEX, LLC,
Plaintiff,

v.

HECTOR'S RESTAURANTS, LLC,
Defendant.

**DEFENDANT HECTOR'S RESTAURANTS LLC'S MEMORANDUM
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This case is about one restaurant’s false claim of ownership over the triangle. Plaintiff’s action would cause Hector’s to face bankruptcy simply because both restaurants’ customers enjoy foods served on triangular tortillas. In 2007, Plaintiff opened a restaurant with a brand identity built around triangular tortillas. Compl. ¶ 6; Ex. A, at 8:20-28. Using a quick and inexpensive manufacturing process to prepare the tortillas, Plaintiff designed a majority-triangular menu, claimed triangular tortillas taste better, and advertised their functionality as nachos. Compl. ¶¶ 9-17.

In 2018, Hector’s incorporated triangular tortillas to augment its existing menu of authentic Mexican fare. Compl. ¶ 20. Both restaurants have benefited from serving triangular tortillas. *See* Compl. ¶¶ 11-14; Ex. A, at 14:9-14. Plaintiff seeks to enjoin Hector’s from serving triangular tortillas. Compl. ¶ 30. But the Lanham Act entitles businesses to compete and innovate using designs within the same shape category, so long as they’re functional. *See TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (1997). Examples of functional food shapes served by multiple restaurant chains abound — nachos are a paradigmatic example.

The key question here is whether Plaintiff’s use of triangular tortillas is entitled to Lanham Act protection. The answer is no, and summary judgment is appropriate because there is no genuine dispute as to the fact that Plaintiff’s triangular tortillas are functional. The court should find triangular tortillas to be functional as a matter of law, deny trade dress protection for triangular tortillas, and grant Hector’s motion for summary judgment.

STATEMENT OF FACTS

The following facts are not in dispute. Trilátero's and Hector's are both restaurants with locations in Arizona serving Mexican-inspired fare. Def.'s Mot. Summ. J. Ex. A, 10:4; Def.'s Mot. Summ. J. Ex. B, 8:1. There are many such restaurants in Arizona, and it is difficult for smaller chains to survive without unique offerings to differentiate themselves from the competition. Ex. A, at 14:9-14; Ex. B, at 12:11-28. Serving food on triangular tortillas can help such restaurants succeed. Ex. A, at 14:5-14; Ex. B, at 19:1-8. In terms of time and money, triangular tortillas cost very little to prepare. Compl. ¶ 16-17; Ex. B, at 20:22-21:11.

In 2015, one such smaller chain, Hector's, opened its flagship Tempe location to positive reviews and community support for its authentic Mexican fare. Ex. B, at 4:17; Ex. B, at 9:15-25. But in 2017, when Hector's expanded to Phoenix, sales there flagged. Ex. B, at 10:10-27. By 2018, Rosa Camila Cruz González, co-founder and co-owner of Hector's, had experimented with a variety of gimmicks to attract customers: happy hours, theme nights, food in unusual shapes, cocktail specials, and even a magician to perform in the restaurant. Ex. B, at 12:11-24. While it pained her to resort to such novelties, Ex. B, at 18:14-19, Rosa was comforted by the hope that people who came for the gimmicks would return for Hector's authentic Mexican fare. Ex. B, at 13:21-24.

Rosa found that customers enjoyed eating tacos served on triangular tortillas, and the offering helped financially stabilize the Phoenix Hector's. Ex. B, at 18:21. Reluctantly, Rosa dedicated a corner of the menu to these novelty foods, and advertised

their availability. Ex. B at 19:6-7; Ex. B at 20:8-9. Eventually, the triangular tortillas became a permanent part of the menu at the Hector's restaurants in Phoenix, Scottsdale, and Mesa. Ex. B, at 19:15-16.

Trilátero's was founded by two white people in 2007, Ex. A, at 4:16-17; Ex. A, at 9:1, who believe their restaurant was the first in America to serve "traditional Mexican food" on triangle-shaped tortillas. Compl. ¶ 10. The majority of Trilátero's menu items have a triangular component, Compl. ¶ 12, and Trilátero's includes a variety of references to triangles in its marketing. Compl. ¶ 11. "Trilátero" translates to "three-sided" or "trilateral." *Id.*

Plaintiff's most-used advertising slogan is "it tastes better in a triangle," another is "taste the triangle;" any time Trilátero's opens a new location, they "plaster [this slogan] on everything." Ex. A, at 15:9-27. Similarly, a favorable review of Trilátero's concluded "I guess their slogan is right: it does 'taste better in a triangle.'" Ex. A, at 15:9-12. Some customers have opined that fare served in triangular tortillas tastes better because of the filling-to-tortilla ratio, Ex. A, at 19:17-19. However, Trilátero's co-owner and co-founder Robert Parr doesn't think that the fare served at Trilátero's tastes better because it is served in triangular tortillas. Ex. A, at 16:5-9; 16:20-21.

Around 2008, Plaintiff ran an advertising campaign with the slogans "free desert nachos" and "bonus scooping nachos." Ex. A, at 17:26-30. These slogans refer to the phenomenon of fillings becoming available to eat off of the plate, nachos-style, after they have fallen as a result of being served in a triangular tortilla. Ex. A, at 17:18-25. At first, Parr described this phenomenon negatively; he said the purpose of the campaign was to

address complaints by positively reframing the phenomenon. Ex. A, at 18:4-9. The campaign succeeded: people stopped complaining, and some people even said they liked that the fillings fell out. Ex. A, at 18:3-17.

Plaintiff's method of manufacturing triangular tortillas is simple and inexpensive, or, as Parr put it, "super easy." Ex. A, at 13:6-13. The process's steps are (1) making circular tortillas as normal using a press, (2) cutting the circle into a triangle using a pizza cutter, and (3) reusing the cut-off parts in the next batch of dough. *Id.* This process adds no food costs and adds minimal labor and time costs (on average about 16 and never more than 34 minutes per shift) to the process. *See* Ex. A, at 13:14-27.

Plaintiff objects to Hector's use of triangular tortillas and filed a Lanham Act claim seeking damages and to enjoin Hector's from serving or advertising them. Compl. ¶¶ 30-31. Hector's seeks summary judgment, arguing that even taking all evidence in the light most favorable to Plaintiff, triangular tortillas are functional and thus not entitled to Lanham Act protection. Def.'s Mot. Summ. J. 1.

ARGUMENT

Defendant is entitled to summary judgment on Plaintiff's Lanham Act claim because the undisputed facts establish that triangular tortillas are functional and therefore not entitled to trade dress protection.

A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the suit under the governing law. *See Disc Golf Ass'n v. Champion Discs, Inc.*, 158 F.3d 1002, 1005-06 (9th Cir. 1998). In considering a motion for summary judgment, a court reviews the facts and all reasonable inferences in the light most favorable to the non-moving party. *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 863 (9th Cir. 2020).

Here, no material facts are in dispute, and only questions of law remain for the Court. Taking the undisputed material facts in the light most favorable to Trilátero's, summary judgment is nonetheless appropriate because (1) their triangular tortillas yield a utilitarian advantage, (2) their advertising touts this utilitarian design, and (3) their method of manufacturing triangular tortillas is simple and inexpensive. Weighed collectively, these factors support of a finding of functionality, and the Lanham Act does not protect functional designs as a matter of law.

I. Defendant's motion for summary judgment should be granted because Plaintiff has failed to demonstrate any genuine dispute as to the fact that Trilátero's triangular tortillas are functional as a matter of law.

The Lanham Act provides a cause of action to anyone injured when a person uses any word, term, name, symbol, or device likely to cause confusion as to the origin, sponsorship, or approval of their product. 15 U.S.C. § 1125(a)(1)(A). A trade dress is a nonfunctional distinctive overall “look” that identifies the product with its source. *TrafFix*, 532 U.S. at 28.

To prevail on a claim for trade dress infringement under the Lanham Act, a party must prove that (1) the product design of the two products is confusingly similar; (2) the features of the product design are primarily non-functional; and (3) the product design is inherently distinctive or has acquired secondary meaning. *See Disc Golf*, 158 F.3d at 1004. Only element (2), functionality, is at issue here.

In an infringement action for unregistered trade dress, the party asserting protection has the burden of proving that the matter sought to be protected is not functional. 15 U.S.C. § 1125(a)(3). When a party's claimed trade dress is found to be functional as a matter of law, it is not entitled to Lanham Act protection. *Disc Golf*, 158 F.3d at 1004. Functional features of a product are features which constitute the actual benefit that the consumer wishes to purchase, as distinguished from an assurance that a particular entity made, sponsored, or endorsed a product. *Id* at 1006. Summary judgment must be granted when the party seeking Lanham protection fails to create a material issue of fact as to whether its claimed trade dress's design is nonfunctional. *Id* at 1008.

To determine whether a product feature is functional as a matter of law, a court considers these three factors: (1) whether the design yields a utilitarian advantage, (2) whether advertising touts the utilitarian advantages of the design, and (3) whether the particular design results from a comparatively simple or inexpensive method of manufacture. *Id* at 1006. No one factor is dispositive; all should be weighed collectively. *Id* (cleaned up).

When a design yields a utilitarian advantage, it weighs in favor of functionality. *See Talking Rain Beverage Co., Inc. v. S. Beach Beverage Co.*, 349 F.3d 601, 603 (9th Cir. 2003). If a seller advertises the utilitarian advantages of a particular feature, this constitutes strong evidence of functionality. *Disc Golf*, 158 F.3d at 1008 (cleaned up). When a particular design results from a simple or inexpensive method of manufacture, it weighs in favor of functionality. *See Blumenthal*, 963 F.3d at 864.

Here, Plaintiff's alleged trade dress is not registered, therefore Plaintiff has the burden of proving triangular tortillas are not functional and therefore protectable. Even taking the evidence in the light most favorable to Plaintiff, Plaintiff has failed to do so.

Plaintiff's triangular tortillas yield a utilitarian advantage because some customers think menu items served in triangular tortillas taste better and because fillings inside menu items served in triangle tortillas fall and create "bonus nachos." Ex. A., at 17:11; Ex. A., at 18:3. Triangular-tortilla-based foods are also common in the industry, further supporting a finding that triangular tortillas yield a utilitarian advantage.

Plaintiff's advertising touts the utilitarian design of triangular tortillas. *See Compl.* ¶ 11(d). Plaintiff's most-used advertising slogan is "it tastes better in a triangle," and its

advertising has also included the slogan “taste the triangle.” Ex. A, at 15:9-27. Taste is a key function of food, and these slogans tout the utility of a triangular tortilla to improve taste. Furthermore, Plaintiff’s advertising includes the slogans “free desert nachos” and “bonus scooping nachos.” Ex. A, at 17:26-30. These slogans tout the utility of a triangular tortilla to scoop up fallen fillings. Ex. A, at 17:18-25.

Lastly, Plaintiff’s method of manufacturing triangular tortillas is simple and inexpensive — Parr describes it as “super easy,” it adds no food costs, and it adds only minimal time and labor costs. Ex. A, at 13:6-27.

Weighed collectively in the light most favorable to Plaintiff, these factors demonstrate the lack of any genuine dispute as to the fact that the triangular tortillas are functional, and therefore not entitled to trade dress protection. Accordingly, the court should grant Hector’s motion for summary judgment.

A. Triangular tortillas yield a utilitarian advantage — they are common in the restaurant industry, some patrons think they taste better, and their fillings fall out, creating bonus nachos.

A product feature need only have *some* utilitarian advantage to be considered functional. *Disc Golf*, 158 F.3d at 1007 (cleaned up). A design choice’s being common in its industry corroborates assertions that the design yields a utilitarian advantage, *see id.*, as does a designer’s awareness of a utilitarian purpose for features of its product. *See Blumenthal*, 963 F.3d at 863. In a close example, a court, applying the identical Lanham Act standard, held that customers perceiving a food item to taste better because of its shape suggests the overall product design is essential to its purpose and affects its quality,

thereby yielding a utilitarian advantage. *Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1206-07 (11th Cir. 2004) (considering the role shape plays in a food product design's functionality). This in turn supports a finding that the design is functional and not entitled to trade dress protection. *Id.*

Here, triangular tortillas are common in the restaurant industry, corroborating Defendant's assertion that the design is functional. Triangular tortillas are the standard design used in nachos, a common offering at Mexican and Hispanic-inspired restaurants across the country. Trilátero's use of triangular tortillas is simply an appropriation of the nacho form, scaled up. Trilátero's own advertising acknowledges this similarity, characterizing the phenomenon of using the remainder of a triangular tortilla to eat taco filling that has fallen onto the plate as "bonus scooping nachos." Ex. A, at 17:29. Trilátero's awareness of this utilitarian purpose for the feature of triangular tortillas supports a finding of functionality.

Further evidence demonstrating utilitarian advantage comes from the improved taste (whether real or perceived) that results from serving triangle-shaped foods. In *Dippin' Dots*, the court reasoned that the spherical shape of an ice cream novelty created a perception of the ice cream as "particularly tasty." 369 F.3d at 1206. Indeed, a customer survey found that twenty percent of respondents believed the shape enhanced the flavor, and a majority perceived the shape as creating a superior texture. *Id.*

Similarly, here, ten percent of Trilátero's online reviews said food tastes better in a triangle. Ex. A, at 19:17. Specifically, reviewers mentioned enjoying the filling-to-tortilla ratio and fallen fillings caused by the triangular tortilla. Ex. A, at 19-20. Even when

taking the facts in the light most favorable to Plaintiff and accepting Parr’s statement that the branding “it tastes better in a triangle” is non-literal, it is clear that at least *some* customers believe that the shape actually improves the taste. Again, a product feature need only have *some* utilitarian advantage to be considered functional. *Disc Golf*, 158 F.3d at 1007 (cleaned up).

Just like nachos, triangular tortillas improve taste and are useful for scooping up fallen fillings. Those are utilitarian purposes. Accordingly, Plaintiff’s triangular tortillas are functional and not subject to trade dress protection.

B. Trilátero’s advertising touts a utilitarian design — its most-used slogan is “it tastes better in a triangle” and it curbed customer complaints with its “bonus scooping nachos” advertising campaign.

A court should consider the extent of advertising touting the utilitarian advantages of the design; however, the advantages of a specific design feature need not be touted explicitly, but may be implied from the advertisement as a whole. *Disc Golf*, 158 F.3d at 1008 (cleaned up). When advertising is ambiguous, each reasonable interpretation is subject to scrutiny regarding its touting of a design’s utilitarian features. *See Talking Rain*, 349 F.3d at 603-04. Courts are not required to ignore advertising that touts functional features just because those advertisements may have included messages aimed at nonfunctional features. *Id* at 604. The size and shape of a food product’s design can be crucial to its taste and consistency, thereby affecting its quality; taste is a key component of a food’s functionality. *See Dippin’ Dots*, 369 F.3d at 1206-07.

Trilátero's advertising touts its tortillas' utilitarian design. The strongest evidence comes from Plaintiff's own complaint: "Over the years, Plaintiff has used many slogans that tout the advantages of triangle-shaped tortillas." Compl. ¶ 11(d). Furthermore, Parr stated in his deposition that "it tastes better in a triangle" is "by far the slogan [Trilátero's] use[s] the most." Ex. A, at 15:15-16. Parr goes on to say that whenever "[Trilátero's] opens a new location, we plaster [the slogan] on everything." Ex. A, at 15:26-27. Similarly, a favorable review of Trilátero's concluded "I guess their slogan is right: it does 'taste better in a triangle.'" Ex. A, at 15:9-12. These facts suggest that many Trilátero's patrons are familiar with this advertising slogan, which associates triangularity with good taste.

Parr stated that he doesn't actually think that the fare served at Trilátero's tastes better because it is served in triangular tortillas as opposed to round ones. Ex. A, at 16:5-9; 16:20-21. Taken in the light most favorable to Plaintiff, the implication is that the slogan is meant to be interpreted non-literally. Nevertheless, at least one meaning of Plaintiff's advertising is that food served in triangular tortillas tastes better, which supports a finding of functionality.

Furthermore, Plaintiff's advertising touts utilitarian advantages of triangular tortillas other than good taste. Trilátero's ran an advertising campaign that touted the benefit of items inside a triangular taco falling out onto the plate. Ex. A, at 17:18-20. Television commercials showed the fillings of a taco falling out onto the plate, only to be scooped up later with a tortilla chip, Ex. A, at 17:23-25, and ended with a voiceover saying phrases like "free dessert nachos" and "bonus scooping nachos." Ex. A, at 17:26-

30. The purpose of the commercial was to demonstrate that, because of the triangular tacos, sometimes fillings would fall out, leaving a “little bonus after your meal.” Ex. A, at 18:1-3. Parr described this phenomenon negatively, and said the purpose of the advertising campaign was to address complaints by reframing it positively. Ex. A, at 18:4-9. This campaign was successful: people stopped complaining, and some people even said that they liked that the fillings fell out. Ex. A, at 18:10-17.

Viewing these facts in the light most favorable to Plaintiff, the triangular tortillas could be construed as dysfunctional — food falling off the tortilla in a way that would not occur with a round tortilla was initially viewed as a problem, according to Parr. However, Parr’s canny advertising campaign demonstrated this phenomenon to be a feature, not a bug, and effectively curbed customer complaints by advertising the function of the triangular tortilla as a nacho. Trilátero’s advertising campaign need not explicitly state “our tortillas function effectively as nacho chips with which to scoop dropped filling because they are triangular.” Rather, the usefulness of the triangular design is implicit in the advertising; the inference of functionality is inescapable.

Whether literally or facetiously, Trilátero’s repeatedly states “it tastes better in a triangle” in its advertising. Trilátero’s also advertises its triangular tortillas’ ability to function as nachos. These facts, even when presented in the light most favorable to Plaintiff, permit only one legal conclusion: Plaintiff’s advertising of the triangular tortilla touts its utilitarian design.

C. Trilátero’s particular design results from a comparatively simple and inexpensive manufacturing process — making triangular tortillas adds no food costs and adds minimal labor and time costs.

A functional benefit may arise if a design achieves economies in manufacture or use. *Disc Golf*, 158 F.3d at 1008. The party asserting trade dress protection has the burden of proving that the matter sought to be protected is not relatively simple or inexpensive to manufacture; offering no evidence to do so weighs in favor of a finding of functionality. *Id.*

Here again, Plaintiff’s own assertions in the record provide the strongest evidence against its complaint. Parr described the triangular-tortilla manufacturing process as “super easy.” Ex. A, at 13:6. The process’s steps are (1) making circular tortillas as normal using a press, (2) cutting the circle into a triangle using a pizza cutter, and (3) reusing the cut-off parts in the next batch of dough. Ex. A, at 13:6-13. This process adds no food costs and adds minimal labor and time costs (on average about 16 and never more than 34 minutes per shift) to the process. *See* Ex. A, at 13:14-27. Plaintiff has achieved economy in manufacture via its remarkable efficiency and reuse of materials. Therefore, Plaintiff’s triangular tortilla design results from a comparatively simple or inexpensive method of manufacture.

Viewing the evidence in the light most favorable to Plaintiff, Trilátero’s triangular tortillas are functional as a matter of law. Weighed collectively, the factors discussed herein sufficiently indicate the lack of any genuine dispute as to the fact that the triangular tortillas are functional, and therefore not entitled to trade dress protection.

CONCLUSION

The court should grant Plaintiff's motion for summary judgment.

My word count is 3,462. I neither gave nor received unauthorized assistance in completing this motion memo.

Daniel E. Stainkamp

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WRITING SAMPLE B

I wrote the following motion memorandum in Spring 2022 as my submission to the Joint Journal Competition, which is the North Carolina Law Review's method for selecting new staff members. I was awarded a position as a staff member for my performance on this competition; I have since been promoted to Comments Editor for the North Carolina Law Review. This is my own independent writing, unedited by others.

The assignment was to draft a recent development memorandum taking a position in response to the North Carolina Supreme Court's ruling in *Southern Environmental Law Center v. North Carolina Railroad Company*, 378 N.C. 202, 2021-NCSC-84. I argued that the court's decision in this case protected corporate privacy at the expense of a fully informed citizenry.

Right to Know versus Right to No: How the North Carolina Supreme Court’s Protection of Corporate Privacy Hurts an Informed Citizenry

Introduction

Something is rotten in the state of North Carolina. In recent years allegations of fraud and corruption have been leveled against democrats and republicans alike.¹ In late 2021, the Senate adopted Senate Bill 473, entitled “Enhance Local Government Transparency.”² It seems they took a cue from Louis Brandeis, who remarked, “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”³ But the judiciary’s approach to interpreting this and other sunshine laws neglects an insidious problem. Governments have increasingly colluded with private entities to subvert open records law compliance.⁴ The corporate form has become a cloaking device, allowing state-controlled entities to dodge accountability.⁵

While “public” and “private” are often discussed as binary opposites, the line between the two blurs⁶ in practice.⁷ The North Carolina Supreme Court addressed this in *Southern Environmental Law Center v. North Carolina Railroad Co.*, decided in 2021.⁸ The issue was whether the state exercises such “substantial control” over the North Carolina Railroad Company (NCRC) that it is an agency or subdivision of government for the purposes of the Public Records Act (the PRA).⁹ The court analyzed this issue using a non-outcome-determinative¹⁰ nine-factor test¹¹ to inform a “totality of the circumstances” approach to interpret the intent of the PRA.¹²

The supreme court reasoned that the amount of “sovereign authority” the state wields over a given entity is an “important feature” of any PRA determination.¹³ This offers more discretion to judges than the restrictive approaches favored in some states.¹⁴ But flexibility is value-neutral. The majority might have acceded to Southern Environmental Law Center (SELC) by liberally construing the PRA, establishing a precedent favoring broad access. Instead, it made a rigid, outdated interpretation that privileges corporate privacy at the expense of transparency.

The decision in *SELC* was a victory for NCRC and other quasi-governmental entities¹⁵ who prefer nondisclosure¹⁶ and fear harassment.¹⁷ In the age of privatization,¹⁸ the decision is unsurprising. And there's a colorable argument that such protections prevent a chilling effect whereby entities subject to sunshine laws simply evade scrutiny preemptively by not producing records in the first place.¹⁹ All this notwithstanding, the decision is bad for democracy.²⁰

This Recent Development will analyze the implications of the supreme court's decision in *SELC*. In doing so, it will weigh the protection of the privacy of quasi-public entities like NCRC against the obstacles to a well-informed citizenry and an effective fourth estate created by the decision. Part I of this analysis will discuss the background of *SELC*. Part II will evaluate the difficulty of balancing the competing interests of privacy and transparency. Part III will discuss the quasi-government doctrine²¹ and examine the supreme court's narrow construction of the PRA. Part IV proposes solutions to correct course after the dangerous precedent set by *SELC*.

I. Relevant Facts of *Southern Environmental Law Center v. North Carolina Railroad Co.*

NCRC was created by statute in 1849.²² North Carolina was its majority shareholder at that time; by 2006 it owned all NCRC stock.²³ Today, the state chooses NCRC's directors, approves all substantive changes to its articles of incorporation, facilitates financing, receives rate reports, controls its revenue, and will receive its assets upon dissolution.²⁴ In 2019, SELC wrote to NCRC to request records, pursuant to the PRA, related to NCRC's involvement in a light rail project.²⁵ NCRC denied the request, claiming it was not subject to the PRA.²⁶

SELC filed suit to compel production of the records.²⁷ After a hearing, the North Carolina Business Court granted NCRC's motion for summary judgment, citing lack of clear legislative intent that NCRC be subject to the PRA.²⁸ The decision in *SELC* affirmed that decision, holding